

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KIRBY F. SMITH, JR. and DEPARTMENT OF HEALTH & HUMAN  
SERVICES, FOOD & DRUG ADMINISTRATION, Rockville, MD

*Docket No. 99-911; Submitted on the Record;  
Issued April 18, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's July 25, 1998 request for reconsideration.

In a decision dated July 28, 1997, the Office reviewed the merits of appellant's claim and denied modification of its prior decision on July 23, 1996, which found that the factors of employment to which appellant attributed his emotional condition in 1987 either did not occur or did not constitute compensable factors of employment.

On July 25, 1998 appellant requested reconsideration. In support thereof, appellant submitted a 12-page motion together with medical reports dated July 21, 1997 and June 8, 1998.

In a decision dated October 19, 1998, the Office denied a merit review of appellant's claim on the grounds that the evidence submitted in support of his July 25, 1998 request for reconsideration was repetitious and immaterial.

The Board finds that the Office did not abuse its discretion in denying appellant's July 25, 1998 request for reconsideration.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>1</sup> Evidence that repeats or duplicates evidence already in the

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<sup>1</sup> 20 C.F.R. § 10.138(b)(1).

record has no evidentiary value and constitutes no basis for reopening a case.<sup>2</sup> Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.<sup>3</sup>

Appellant's 12-page motion does not show that the Office erroneously applied or interpreted a point of law in its July 28, 1997 decision. Indeed, appellant's motion never addresses the Office's July 28, 1997 decision. The record shows that appellant prepared this motion prior to the Office's July 28, 1997 decision. The record further shows that the Office received this motion on July 24, 1997. To support his July 25, 1998 request for reconsideration, appellant submitted what is essentially a copy of the same motion.<sup>4</sup> As the motion fails to address the decision at issue, much less show that the Office erroneously applied or interpreted a point of law in that decision, appellant may not obtain a review of the merits of his claim under the first criterion above.<sup>5</sup>

As the Office has previously considered this motion, appellant may not obtain a merit review of his claim under the second criterion above.

Regarding the medical reports dated July 21, 1997 and June 8, 1998, the record shows that the Office received a facsimile transmittal of the former on July 21, 1997, or prior to the Office's decision on July 28, 1997. Regardless, these reports are not relevant and pertinent to the grounds upon which the Office denied appellant's claim. The Office found that the factors of employment to which appellant attributed his emotional condition in 1987 either did not occur or did not constitute compensable factors of employment. Whether the implicated factors of employment occurred as alleged is an issue of fact, not an issue of medicine. Although the medical reports in question relate a factual background, physicians may not adjudicate the weight of the evidence or make findings of fact as to whether the incidents implicated by appellant did or did not occur as alleged. And while a consistently reported contemporaneous medical history may have a tendency to support that the incidents occurred as reported, it is difficult to conceive how a medical history of events occurring nine or more years past can be relevant or pertinent to any meaningful determination of those events, particularly when the history appears to derive substantially from appellant's recollection. Whether the implicated factors of employment constituted compensable factors of employment is an issue of law. Medical reports have no bearing on such an issue. Because the July 21, 1997 and June 8, 1998 medical reports are not relevant and pertinent evidence not previously considered by the Office, appellant is not entitled to a merit review of his claim under the third criterion above.

Section 10.138(b)(2) of Title 20 of the Code of Federal Regulations provides that when an application for review of the merits of a claim does not meet at least one of the three criteria specified in section 10.138(b)(1), the Office will deny the application for review without

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<sup>2</sup> *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

<sup>3</sup> *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>4</sup> Appellant added a sentence referencing the medical reports of July 21, 1997 and June 8, 1998, and he corrected several typographical errors appearing in the original motion. Otherwise, the motions appear identical.

<sup>5</sup> Had appellant specified that he was resubmitting the 12-page motion to support a request for reconsideration of the Office's July 23, 1996 decision, his request would be untimely and subject to a harsher standard of review.

reviewing the merits of the claim.<sup>6</sup> For this reason, the Board finds that the Office did not abuse its discretion in denying appellant's July 25, 1998 request.

The October 19, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
April 18, 2000

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>6</sup> 20 C.F.R. § 10.138(b)(2).